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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers, *et al.*,
Appellants,

v.

PHIL H. GALLAGHER, individually and as State Treasurer, of the State of Washington, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF ON MOTION TO DISMISS

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 329

GENE BUCK, individually and as President of the American Society of Composers, Authors & Publishers; CARL FISCHER, INC., G. SCHIRMER, INC., IRVING BERLIN, INC., DEEMS TAYLOR, OLEY SPEAKS, WILLIAM J. HILL, ANNE PAUL NEVIN, ELLA HERBERT BARTLETT and JANE SOUSA,

Appellants,

v.

PHIL GALLAGHER, as State Treasurer of Washington; CLIFF YELLE, as State Auditor of Washington; ERNEST N. HUTCHINSON, as Secretary of State of Washington; G. W. HAMILTON, as Attorney General for the State of Washington; B. GRAY WARNER, as District Attorney of King County of Washington; HARRY H. JOHNSTON, as District Attorney of Pierce County of Washington; RALPH E. FOLEY, as District Attorney of Spokane County of Washington; A. W. SWANSON as District Attorney of Snohomish County of Washington; H. W. COVALT, as District Attorne of Whatcom County of Washington; SMITH TROY, as District Attorney of Thurston County of Washington; PAUL O. MANLEY, as District Attorney of Grays Harbor County of Washington; JOHN D. EVANS, as District Attorney of Yakima County of Washington; GLEN L. BEAN, as District Attorney of Walla Walla County of Washington; SAM M. DRIVER, as District Attorney of Chelan County of Washington; K. M. O. INC., a corporation; JOHN G. LOCKHART,

Appellees.

ATTORNEY GENERAL'S BRIEF ON MOTION TO DISMISS

The Attorney General of the State of Washington has interposed a motion to dismiss the appeal herein on the grounds:

First, Because the Governor of the State of Washington, an indespensible party, has not been made a party defendant in this action, which challenges the constitutionality of a statute of the State of Washington;

Second, Because certain state and county officers sued have either resigned or died, and their offices have been filled by others who have qualified therefor, and in at least one instance one defendant named was not at the time of the commencement of the action a state officer but that office was held by another who was the qualified and acting Treasurer of the State at the time.

Third, Because no citation on appeal has ever been served upon the Attorney General of the State of Washington nor upon his attorney of record herein, although he has appeared in said cause in his own behalf and by an Assistant Attorney General, representing said Attorney General and all state offices made defendants herein.

By Section 380, Title 28, U. S. C. A. (Judicial Code Sec. 266, amended) it is provided:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any

statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement * * * shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof * * * upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a Circuit or district judge, and shall be heard and determined by three judges * * * Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: * * *"

The Governor of the State of Washington, a necessary and indispensable party, and whose duty it is to enforce all laws of the State of Washington, is neither sued, sought to be enjoined nor brought into court by any legal process issuing out of the United States District Court, so that neither this court, nor the three-judge court has acquired jurisdiction of his person or proper jurisdiction of the subject matter of this controversy.

Arneson v. Denny, (D. C. Wash. 1928) 25 F. (2) 993;

State ex rel. Reed v. Gormley, 40 Wash. 601.

Art. III, Sec. 5, of the Constitution of the State of Washington, provides:

"The governor may require information in writing from the officers of the state upon any subject relative to the duties of their respective offices and *shall see that the laws are faithfully executed.*" (Italics ours.)

This proceeding was commenced in the United States District Court, Western District of Washington, Southern Division, in June, 1937 (Tr. 1), against state officers, including the Attorney General, but not the Governor.

Rule 17 (b), District Court Rules, provides:

"The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held; * * *"

The Governor of the State of Washington is charged by Art. III, Sec. 5, of the Constitution of the State of Washington with the duty of seeing "that the laws are faithfully executed."

But no attempt has been made by appellants to prevent him from performing that duty with respect to the State Statute (ch. 218 of the Laws of Washington for 1937, pp. 1070 to 1085).

Rule 5 (b) District Court Rules provides:

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney *unless service upon the party himself is ordered by the court.* * * *" (Italics ours.)

The order made and entered herein on June 9, 1937, by Judge Cushman, reads in part:

"It is further ordered that the complainants forthwith deliver to the Honorable Clarence D. Martin, Governor of the State of Washington, and each of the defendants, copy of this order and, if such has not already been done, *a copy of their bill of complaint and motion for injunction with supporting affidavits filed herein.*" (Tr. p. 210.)

There was served upon the Governor of the State of Washington a copy of the notice of hearing (Tr. p. 234) and the order of Judge Cushman (Tr. p. 210) but no copy of the bill of complaint (Tr. p. 1) or the supporting

affidavits for the motion for temporary injunction (Tr. p. 93) as required by the order (Tr. p. 210).

The bill of complaint in this case seeks to enjoin Otto Case, as State Treasurer of the State of Washington and individually. (Tr. 1.)

Otto Case was not at the time of the institution of this action in 1937, nor is he now, State Treasurer of the State of Washington.

Phil Gallagher was elected State Treasurer in November, 1936, and took office in January, 1937. He was never served with process of any kind in this suit, nor was citation ever served upon him, yet he has been substituted without authority in law as a party defendant.

John D. Evans, originally named as district attorney for Yakima County, never at any time held that position. He now is, and at the time of the commencement of this action was, prosecuting attorney for Whitman County.

The prosecuting attorney of Yakima County at the time of the commencement of this suit was Robert J. Willis, who, voluntarily appeared in said action, but prior to the entry of the order of dismissal herein resigned and was appointed on August 31, 1937, Judge of the Superior Court for Yakima County. He was succeeded on September 27, 1937, by Lloyd C. Wiehl as prosecuting attorney, who has qualified as such. Weihl has never been served with process, nor citation of any kind in this proceeding.

Ernest N. Hutchinson, as Secretary of State of the State of Washington, is one of the defendants sought to be personally enjoined. Mr. Hutchinson died in Seattle January 30, 1938, and Belle Reeves succeeded to the

vacancy caused by his death on February 7, 1938, and has qualified. She has never been served with process, and no attempt has been made to enjoin her, either in her official capacity as a state officer, or individually.

Sam M. Driver, as district attorney of Chelan County, is named as a defendant. This party was not at the time of the commencement of this action district or prosecuting attorney of Chelan County, but the prosecuting attorney of that county on April 1, 1937, and at the time of the commencement of this action, and at all times since was Lynn Gemmill. By their action appellants have neither served process nor citation upon the said Lynn Gemmill, an indespensible party to this action. (Aff. Belcher, Appendix A.)

There is no law in the State of Washington authorizing a revival or continuance of this character of an action against successors in office in their official capacities or individually.

Upon the death or resignation of such state officer the action abates under the common law which, except as modified by statute, is the law of Washington. Rem. Rev. Stat. of Washington, Sec. 143.

State ex rel. King County v. Superior Court, 104 Wash. 268, 176 Pac. 352.

In *Shaffer v. Howard*, 249 U. S. 200, 39 S. Ct. 255, 63 L. Ed. 559, in dismissing an appeal from the District Court of the United States for the Eastern District of Oklahoma (250 Fed. Rep. 873), to review a decree dismissing a bill to enjoin the enforcement of a tax, where the term of offices of the original parties defendant had expired, and their successors had qualified and there was

no law of the State of Oklahoma authorizing a revival or continuance of the cause of action against such successors, this court said:

"Counsel for both parties having stated in answer to an inquiry on the subject submitted to them by the court while the cause was pending after argument under submissioin that the term of office of the defendant officials had expired and their successors had qualified, and that there was no law of the State of Oklahoma authorizing a revival or continuance of the cause of action against such successors, it follows that the controversy has become merely moot, and that we have no authority to further consider or dispose of it. *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, 34, 41 L. Ed. 621, 623, 17 Sup. Ct. Rep. 225; *Chandler v. Dix*, 194 U. S. 590, 592, 48 L. Ed. 1129, 1131, 24 Sup. Ct. Rep. 766; *Pullman Co. v. Croom*, 231 U. S. 571, 575, 58 L. Ed. 375, 34 Sup. Ct. Rep. 182.

"True it is that counsel, in agreeing as to the statement above referred to, suggest that although the successors in office of the former defendants, intend in the discharge of their official duties, to enforce the tax complained of unless enjoined from doing so, nevertheless, in view of the importance to the people of the state that the subject matter of the controversy be here determined, now request a decision of the pending cause irrespective of the parties defendant. But the absence of power which results from such disappearance cannot be supplied by the request referred to, since after all, it amounts to but a suggestion that that be done which there is no authority to do; in other words, that the cause be decided in the absence of the parties whose presence is essential to its decision. *United States v. Boutwell*, 17 Wall. 604, 609, 21 L. Ed. 721, 722; *United States ex rel. Bernardin v.* Rep. 441; *Pullman Co. v. Croom*, 231 U. S. 571, 576, 58 L. Ed. 375, 377, 34 Sup. Ct. Rep. 182.

"It follows, therefore, that the decree below must be reversed, and the cause be remanded with directions to dismiss the bill for want of proper parties.' And it is so ordered."

The Attorney General of the State of Washington, or one of his regularly appointed and qualified assistants,

is the only person authorized by the laws of the State of Washington to represent state officers or who has authority to prosecute or defend actions against the state officers, and any appearance sought to be made in their behalf is neither authorized or binding upon them or either of them.

State v. Gattavara, 182 Wash. 325.

In that case the Supreme Court of the State of Washington, at page 329, said:

"Although the constitutional provision above quoted (Art. III, Sec. 21) is not self-executing when the duty of the Attorney General is prescribed by statute and the statute has for its purpose the authorization of proper state officers to bring actions, that authority is exclusive. As such officer, the *Attorney General* might, in the absence of express legislative restriction to the contrary exercise all such power and authority as the public interest may from time to time require. 6 C. J. 812. See also, *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 Pac. 996; *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 100."

The Constitution of the State of Washington, Article III, Sec. 21, provides:

"The Attorney General shall be the legal adviser to all state officers, and shall perform such other duties as may be prescribed by law * * *."

Rule 10 (United States Supreme Court Rules) provides:

(1) "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal and shall be made returnable not exceeding forty days from the day of signing the citatiion, whether the return day fall in vacation or in term time, except in appeals from California, Oregon, Washington, Nevada, Idaho, Utah, Arizona, New Mexico, Colorado, Wyoming, and Montana, when the time shall be sixty days. The citation must be served before the return day."

The Attorney General's appearance was duly entered in the cause as was the appearance of E. P. Donnelly, Assistant Attorney General, as attorneys for all state officers named as defendants, and thereafter, and before the entry of the order herein appealed from, the said E. P. Donnelly was substituted by John E. Belcher, Assistant Attorney General, and neither the said G. W. Hamilton, Attorney General, nor John E. Belcher, Assistant Attorney General, were served with citation of application for, nor allowance of, appeal to this court, although the record of appearance attached to the transcript on appeal herein clearly shows such appearances.

By Rem. Rev. Stat., Sec. 112, the legislature of the State of Washington has prescribed the powers and duties of the Attorney General as follows:

"1. To appear for and represent the state before the Supreme Court in all cases in which the State is interested;

"2. To institute and prosecute all actions and proceedings for, or for the use of, the state which may be necessary in the execution of the duties of any state officer;

"3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

"4. To consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of crime, and assist in the prosecution."

By Rem. Rev. Stat. of Washington, Sec. 890, it is provided:

"Whenever any action or proceeding for damages shall be instituted against any state officer or employe for the performance of any official act, such officer or employe may request the administrative board to au-

thorize the defense of said action or proceeding at the expense of the state."

If then, as appears by the record herein, service of citation on appeal was attempted to be admitted for the Attorney General (Tr. p. 550) but not by him such receipt by one not in any manner authorized by law to accept such service is a nullity and there has been no service upon the attorney of record for state officers, within the time limited by United States District Court Rule 5 (b) and for failure of such service the appeal must be dismissed.

CONCLUSION

As appears from the foregoing, it is respectfully submitted that the appeal herein should be dismissed for the reasons herein set forth.

Respectfully submitted,

G. W. HAMILTON,
Attorney General of the State of Washington,

JOHN EGAN BELCHER,
Assistant Attorney General of the State of Washington.

Temple of Justice, Olympia, Washington.

Appendix "A"

AFFIDAVIT

UNITED STATES OF AMERICA,
STATE OF WASHINGTON,
COUNTY OF THURSTON. } ss.

JOHN EGAN BELCHER, being first duly sworn, on oath deposes and says that he is a duly appointed, qualified and acting assistant attorney general of the State of Washington and is one of the attorneys of record for all state officers sued herein in their official capacities, and individually, and that the matters and things hereinafter set out are matters and things that have come to his knowledge from an examination of the official records, on file either in the office of the incumbents of said offices or are matters within his personal knowledge, to-wit:

That at the time of the commencement of this action in June, 1937, Clarence D. Martin was and now is the duly elected, qualified and acting Governor of the State of Washington.

That Otto Case, one of the defendants named herein as State Treasurer of the State of Washington, was not at the time of the commencement of this action and is not now and has not been the Treasurer of the State of Washington since the month of January, 1937.

That Phil Gallagher was elected State Treasurer of the State of Washington at the general election in the State of Washington in November, 1936; took office and qualified as such State Treasurer in the month of January, 1937.

That in the month of April, 1937, and prior to the commencement of this action in the United States District Court for the Western District of Washington, Sam Driver named in this action as District Attorney for Chelan County, Washington, was not the district or prosecuting attorney of said Chelan County, Washington, but had theretofore resigned said position and on April 1, 1937, said vacancy was filled by the Board of County Commissioners of said County of Chelan and one Lynn G. Gimmell was so appointed and qualified as such prosecuting attorney on the 1st day of April, 1937.

That one John D. Evans never was at any time prosecuting or district attorney for Yakima County, Washington, although named as such defendant herein.

That at the time of the commencement of this action in the United States District Court one Robert J. Willis was the then duly elected, qualified and acting prosecuting attorney for Yakima County, but thereafter resigned and was, by the Governor of the State of Washington, appointed judge of the superior court for that county on August 31, 1937; that said vacancy in the office of prosecuting attorney for Yakima County was thereafter and on September 7, 1937, filled by the Board of County Commissioners of that county by the appointment of one Lloyd L. Wiehl, who duly qualified and is is now, and at all times since has been the duly appointed, qualified and acting prosecuting attorney of said Yakima County.

That Ernest N. Hutchinson, one of the defendants named, was at the time of the commencement of this action the duly elected, qualified and acting Secretary of State of the State of Washington, but the said Ernest N.

Hutchinson died on January 30, 1938, and the vacancy caused by his death was filled by the Governor of the State of Washington by the appointment of one Belle Reeves, who qualified on the 7th day of February, 1938, and has at all times since been and now is the duly appointed, qualified and acting Secretary of State of the State of Washington.

This affidavit is made in support of the motion of the Attorney General of the State of Washington for a dismissal of the appeal herein, on the ground of lack of proper parties.

Further affiant sayeth naught.

JOHN EGAN BELCHER,

Subscribed and sworn to before me this 3rd day of October, 1938.

JENNIE M. TATTERSALL,

{Notarial Seal} NOTARY PUBLIC in and for the State of Washington, residing at Olympia.